

Plaintiffs incorporated their response to Simmons' Motion, [Dkt. 1793], (hereinafter "Response to Simmons' Motion").¹

I. SUMMARY OF REPLY

Plaintiffs' Response fails to meet or even mention the fundamental flaw on the face of their RFPs that forms the basis for Peterson Farms' Motion, *i.e.* although there may be some limited relevant and discoverable documents within the range of documents Plaintiffs seek, their RFPs are so overly broad that they sweep up within their scope highly confidential business documents and other documents that fall outside the scope of permissible Rule 26 discovery. Plaintiffs completely fail to address Peterson Farms' contention that they failed to properly tailor their RFPs to comply with the reach of Fed R. Civ. P. 26(b)(1). Instead, Plaintiffs seek to justify their RFPs by providing the Court illustrations of a few types of information that *might* be contained within the scope of their requests. Plaintiffs cannot seek to modify their RFPs by way of their Response, nor does their Response defend the breadth of the RFPs on their face. The sole objective achieved by Plaintiffs' Response is that it clearly establishes that the information they truly seek is much narrower than the RFPs they propounded.

Equally striking is the fact that Plaintiffs fail to address that Peterson Farms offered to produce information from the Asset Purchase Agreement ("APA") that would satisfy the relevant inquiry. Pet. Mot. at 3-4 and Ex. "2" thereto. Plaintiffs state in their Response to Simmons' Motion:

Where there has been a transfer of assets between two defendants to an action, the plaintiff is, in order to ensure that liability is properly assigned, entitled to documentation reflecting the nature of the assets transferred, the manner of the transfer, whether fair market value has been given for the assets transferred,

¹ Peterson Farms refers to Plaintiffs' arguments from its two responses collectively as "Plaintiffs' Response."

whether there are any agreements regarding liability or indemnification, and the like.

Id. at 2. It is clear on their face that Plaintiffs' RFPs fail to comport with and are exceptionally broader than their own standard. Nonetheless, with the exception of the "fair market value" inquiry,² Peterson Farms offered to produce the documents addressing each one of these considerations in order to reach a non-judicial resolution of its objections. Plaintiffs rejected both this offer and the opportunity to narrow their RFPs, which leaves both the Court and Peterson to assess the overbreadth of Plaintiffs' RFPs as propounded. Peterson Farms respectfully asserts that such analysis leads to the conclusion that Plaintiffs' RFPs are sufficiently overly broad to abrogate Peterson Farms' obligation to respond.

II. ARGUMENT AND AUTHORITY

A. Plaintiffs' Response Fails to Address Peterson Farms' Fundamental Objection to the Overbreadth of the RFPs

Plaintiffs' Response fails to address the principle objection that necessitated Peterson Farms' request for relief—the overbreadth of their discovery requests. Plaintiffs fail to rebut Peterson Farms' well-founded argument that the scope of their RFPs reaches to irrelevant topics and documents, many of which contain highly sensitive business information the disclosure of which would prejudice Peterson Farms' ongoing privacy and business interests. On the contrary, Plaintiffs hope that a few simple illustrations of a few types of arguably relevant information that may be included in the broader mass of information encompassed within the RFPs will carry the day. It does not. What Plaintiffs clearly have demonstrated to the Court is that their requests could have been more narrowly tailored to address specific, relevant areas of information that it

² Plaintiffs offer no authority to support discovery on this topic and they fail to articulate any argument as to how such information conceivably could be probative or lead to the discovery of admissible evidence.

seeks. Had Plaintiffs drafted their RFPs to “describe with reasonable particularity each item or category” of information sought as required by Rule 34 in the first instance, or as Peterson Farms requested during the meet-and-confer, this dispute may have been avoided. To the extent that Plaintiffs endeavor to cure the overbreadth of their RFPs by way of their Response, this is ineffectual, and it should not dissuade the Court from assessing the propriety of Plaintiffs RFPs as propounded.

B. Plaintiffs’ Response Erroneously Asserts That Peterson Farms is No Longer an Ongoing Business Entity, and Therefore it Can Suffer No Prejudice

Plaintiffs’ Response repeatedly describes Peterson Farms as if it is no longer a going concern. Plaintiffs present this argument to say that since Peterson Farms is no longer in the poultry business, as they claim, then Peterson Farms no longer possesses privacy and business confidentiality interests that can be prejudiced upon the disclosure of irrelevant or marginally probative information. For instance, Plaintiffs’ Response to Peterson Farms’ Motion states, “[s]ince the State is seeking information regarding the transaction between Simmons and Peterson, and Peterson claims that it sold its live production business, and it is no longer in the live production business, it makes little sense that Peterson would suffer any prejudice from producing this information.”³ Resp. to Pet Mot at 2-3. To be clear, Peterson Farms sold only a portion of its total assets to Simmons. Peterson Farms is still a small, closely-held corporation that operates in and around Decatur, Arkansas by and through its poultry breeding operations, poultry research and development facilities, and the Decatur General Store. Peterson Farms did not, as Plaintiffs contend, lose any of the rights and privileges that it had prior to the execution of the APA. As a result, Plaintiffs’ contention that Peterson Farms’ “confidentiality concerns are

³ Based upon this argument, Plaintiffs would suggest that a person’s right to privacy expires upon death. This argument, just like the argument advanced in Plaintiffs’ Response, fails from a lack of legal support.

unfounded” is clearly incorrect. Plaintiffs offer the Court no legal authority that an asset sale such as this in any way impairs Peterson Farms’ well-recognized ability to protect its highly confidential business information, or that it abrogates the prejudice Peterson Farms will suffer upon disclosure as an ongoing member of the poultry industry.

The limited effect that the APA did have on any of Peterson Farms’ potential liability in this case have been communicated to Plaintiffs on multiple occasions; most recently in Peterson Farms’ Motion. *See e.g.*, Pet. Mot. at 2, 5, & 9. Regardless, it is clear that Plaintiffs fail to recognize that Peterson Farms is still in the poultry business, albeit not in the IRW, and is therefore entitled to the same protections it enjoyed prior to the APA.

Furthermore, the cases Plaintiffs rely upon in support of their position are further evidence that they are ignoring the legal effect of an asset sale and how it impacts the permissible scope of discovery. This is so because each of their cited cases discusses discovery issues when the plaintiff is required to prove successor liability.⁴ Successor liability is not an issue in this case because Peterson Farms remains an ongoing concern and any potential liabilities that Peterson Farms had before it executed the APA have not been transferred to Simmons.

⁴*Great Am. Ins. Co. of N.Y. v. TA Operating Corp.*, 2008 WL 1848946, *5 (S.D. N.Y. 2008) “Thus, they make take discovery relating to the acquisition of the former TA entities by TravelCenters of America LLC, provided that it is reasonably calculated to lead to information relevant to the successor liability of the new TA entities as described in the amended complaint.” *Moriarty v. LSC Ill. Corp.*, 1999 WL 1270711, *6 (N.D. Ill. 1999) “To the extent that the requested discovery seeks post-acquisition information, that information could be pertinent to both the assumption and successor doctrines.” *Reed v. Lawrence Chevrolet, Inc.*, 14 Fed. Appx. 679, 687 (7th Cir. 2001) “Reed was similarly prejudiced as the issue of Falls Chevrolet’s liability as a successor.” ... “The district court should have allowed Reed time to conduct discovery regarding the circumstances of Falls Chevrolet’s acquisition.”

C. Plaintiffs Fail to Overcome Peterson Farms' Objection to the Overbreadth of Request No. 1.

Request No. 1 is entirely too broad because it seeks the universal disclosure of all of the transactional documents relating to the asset sale. In response to Peterson Farms' Motion, Plaintiffs justify this request by asserting that they are "entitled to documentation reflecting the nature of the assets transferred, the manner of the transfer, whether fair value has been given for the assets transferred, whether there are any agreements regarding liability or indemnification, and the like." Resp. to Simmons Mot. at 2. What Plaintiffs' Response fails to mention, however, is that Peterson Farms has already offered to provide Plaintiffs with the majority of the information to which they believe they are entitled. *See e.g.* Pet. Mot. at 9. Furthermore, and with respect to Plaintiffs' contention that the permissible scope of discovery extends to "whether fair value has been given for the assets transferred," Plaintiffs' Response lacks any discussion of, or legal citations to, any authorities that support this assertion. Accordingly, it is Peterson Farms' position that this category of information is simply irrelevant to the claims and defenses in this case.

In addition to offering Plaintiffs the relevant information discussed above, Peterson Farms also notified Plaintiffs that the disclosure of the entire APA is highly prejudicial to Peterson Farms because: (1) the majority of the documents are irrelevant to any claims or defense in this case; and (2) the documents are highly confidential, and even if marginally probative in this case, the disclosure of said documents would be highly prejudicial to Peterson Farms' ongoing business affairs. Instead of complying with Peterson Farms' request for them to tailor the requests to seek only the relevant information they need, Plaintiffs contend that their requests are justified and Peterson Farms' prejudice was eliminated by the Confidentiality Order that was previously entered in this case. Plaintiffs' reliance on the Confidentiality Order is mis-

placed. Although the Confidentiality Order provides a procedural mechanism for handling confidential information in this case, it does not, as Plaintiffs suggest, alter substantive rights or change any of the rules of discovery so as to make irrelevant and non-discoverable information discoverable.

Plaintiffs also erroneously contend that *In re REMEC*, 2008 WL 2282647 (S.D. Cal. 2008) supports their position. Plaintiffs fail to point out several distinguishing factors between their RFPs and the discovery in *REMEC*. First, the categories of information requested in *REMEC* were at least arguably relevant to the claims and defenses presented in that securities fraud action. Such is not the case in this environmental action. Second, Plaintiffs' Response correctly identifies that the court allowed only limited discovery of the materials sought. Peterson Farms' Motion identifies, verbatim, the balance of the information for which the court disallowed discovery. Pet. Mot. at 7. Notably, the "disallowed list" is almost identical to the requests made by Plaintiffs in this case. Finally, Plaintiffs' Response fails to make the distinction between the parties from whom the court ultimately allowed limited discovery. As noted in Plaintiffs' Response, the *REMEC* court did allow very limited discovery of relevant information from the defendant's financial advisor—a non-party to any of the subject transactions. *REMEC* at *5. In contrast, and more importantly, the court disallowed the requested discovery directed to the actual parties of the subject transactions. *Id.* at *3. Like *REMEC*, the Court should also disallow Plaintiffs' overly broad RFPs that seek the production of irrelevant information.

D. Plaintiffs Fail to Overcome Peterson Farms' Objection to the Overbreadth of Request No. 2.

Plaintiffs' Response with respect to Peterson Farms' overbreadth objection to Request No. 2 fails to adequately address how any due diligence activities of *operational* assets located

outside the boundaries of the IRW are relevant to this case. In this respect, Plaintiffs' citation to the Court's July 6, 2007 Order [Dkt. 1207] is misplaced as it only addresses corporate knowledge as it relates to the disposition of poultry litter. As clearly set forth in its Motion, the only assets Peterson Farms conveyed to Simmons that were located in the IRW on the date of the APA's closing were its live chickens. Pet. Mot. at 2. Plaintiffs offer a tortured argument that since the chickens are the alleged source of the manure at issue in this case, Peterson Farms should produce all documents related to any environmental due diligence performed thereon in relation to the transaction. If Plaintiffs had framed their request in this way, Peterson Farms could have responded easily, as there are no such documents due to the fact that it did not own or convey any poultry farm in the IRW.

The problem is that Plaintiffs' request does not stop there. Plaintiffs offer nothing to defend the scope of this request, which clearly would extend to Peterson Farms' processing plant and other facilities that lie outside the IRW. The request is overly broad as it is currently written and it seeks the disclosure of irrelevant information.

E. Plaintiffs Fail to Overcome Peterson Farms' Objection to the Overbreadth of Request No. 3.

Plaintiffs' Response fails to address the objections raised by Peterson Farms to Request No. 3, namely the overbreadth of this request, and the fact that the scope of the request sweeps in clearly irrelevant and the most strongly protected and highly confidential information that any closely-held business can ever have. Plaintiffs dismiss Peterson Farms' position that the disclosure of this information would be highly prejudicial through their mis-placed reliance on the Confidentiality Order as a mechanism to cure all ills. As mentioned above, the Confidentiality Order can do no such thing. Rather than argue or submit authority in support of their overly broad request, Plaintiffs merely offer one example of what the responsive materials

“may show.” What Plaintiffs describe is a classic fishing expedition in an attempt to land material that is highly confidential and prejudicial to Peterson Farms—not to mention its lack of relevance to the claims or defenses in this matter. If Plaintiffs’ request had asked for documents involving the transaction to the extent the reasoning for entering the sale involved this litigation, Peterson Farms could have responded. Again, Plaintiffs cannot cure their improperly crafted discovery requests through their briefing, and as such, the request as propounded is impermissibly overly broad, and Peterson Farms should be relieved from the duty to respond.

F. Plaintiffs Fail to Overcome Peterson Farms’ Privilege Objection to Request No. 4.

Plaintiffs’ Response ignores the fundamental premise behind Peterson Farms’ privilege objections to their Request No. 4. As such, Peterson Farms presumes that Plaintiffs agree that communications between Peterson Farms and Simmons about this litigation are subject to protection under the joint defense privilege and the common interest doctrine. Plaintiffs’ Response presents a novel argument, however, that Peterson Farms and Simmons must nonetheless disclose any communications about this lawsuit that they may have exchanged during the course of the transaction. Plaintiffs contend that the joint defense privilege is no longer available to Peterson Farms or Simmons if discussions regarding this case took place between the two while they considered the APA. Plaintiffs’ position in this regard is nonsensical.

Clearly, if any such responsive documents exist, they would remain a subset of the documents falling within the privilege. Plaintiffs can prevail on this tenuous argument only by establishing that Peterson Farms and Simmons intentionally waived these protections against disclosure. They have offered no legal authority or factual predicate to meet this showing, and therefore, the Court should dismiss this argument and sustain Peterson Farms’ Motion.

Furthermore, and for the second time in their Response, Plaintiffs provide a description of information that they contend *may* be responsive to Request No. 4. Had Plaintiffs taken the same amount of time to draft the discovery requests as it took to compile this list of information, much of this dispute could have been avoided. Plaintiffs' Response illustrates that this request is overly broad and could be more narrowly tailored. Notwithstanding Peterson Farms' overbreadth objection, Plaintiffs fail to overcome the application of the joint defense and common interest privileges to this request, and thus, it should be denied.

CONCLUSION

For the foregoing reasons, as well as those set forth in its Motion, Peterson Farms respectfully requests that the Court deny Plaintiffs this discovery and enter an appropriate Protective Order pursuant to Fed. R. Civ. P. 26(c), together with any other relief the Court deems just and appropriate.

Respectfully submitted,

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